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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 93-161
File No. E-89-85

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JUL 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
CLARK-BADER, INC. d/b/a
TMC LONG DISTANCE,

Complainant,

vs.

PACIFIC BELL,

Defendant.

To: Presiding Judge Walter C. Miller

ERRATUM

Complainant CLARK-BADER, INC. d/b/a TMC LONG DISTANCE
("TMC"). by its attorneys. hereby files this erratum to its

CERTIFICATE OF SERVICE

I, Michael R. Carithers, Jr., hereby certify that on this

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In the Matter of

spirit, the Presiding Judge denied Defendant's Motion for Granting Immunity as premature "[g]iven the procedural posture of this case" although the Motion may be refiled if it is determined that a ruling on the Motion is "absolutely essential."

A literal reading of the use of the words "absolutely essential" demonstrates that the Presiding Judge cannot reasonably be said to be referring to the standard under 18 U.S.C. § 6004. Indeed, 18 U.S.C. § 6004 is not even mentioned in the PHO.^{1/} The Presiding Judge simply states that if testimony from other sources can "negate" the need for the testimony of the witnesses in issue, then the need for a ruling on the Motion for Order Granting Immunity will be obviated (note 3 of the PHO). Under such circumstances, it certainly detracts from these proceedings to litigate an unnecessary motion at this time. The Presiding Judge therefore is not issuing a ruling on the public interest requirement under 18 U.S.C. § 6004 or any other requirement in the statute. Rather, the Presiding Judge is considering only the orderly resolution of these proceedings.^{2/}

^{1/} In addition, a literal reading of 18 U.S.C. § 6004(b) shows that before the public interest determination is properly considered, the agency must first be considering whether to issue an order of immunity. Since the Presiding Judge does not reach this issue in the PHO, he can not reasonably be interpreted as opining on the public interest requirement of the statute.

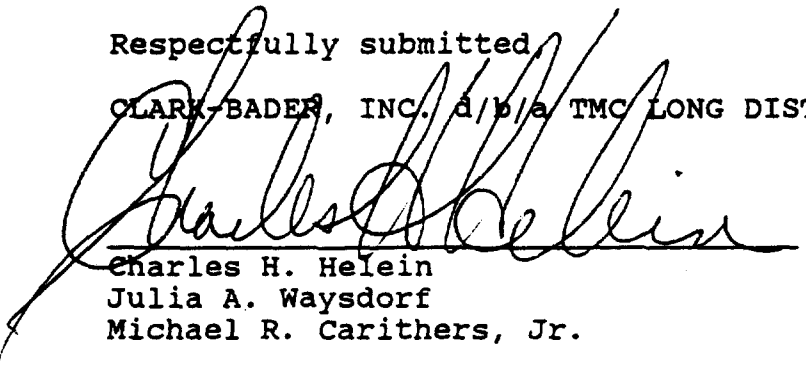
^{2/} Defendant's suggestion that the Presiding Judge "obviously relies" on what Defendant calls a misinterpretation slights the intelligence of the President Judge. See Petition at 2. In addition to not making reference whatsoever to 18 U.S.C. § 6004 in

evidence. As emphasized in TMC's Partial Opposition, such concerns are matters of repeated emphasis by federal tribunals.

unnecessary, but would do more harm than good. Defendant's
Petition for Clarification should be denied.

Respectfully submitted,

CLARK-BADER, INC. d/b/a TMC LONG DISTANCE



Charles H. Helein
Julia A. Waysdorf
Michael R. Carithers, Jr.

GALLAND, KHARASCH, MORSE & GARFINKLE, P.C.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007-4492
(202) 342-5200

Attorneys for Clark-Bader, Inc.
d/b/a TMC Long Distance

Dated: July 23, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
CLARK-BADER, INC. d/b/a
TMC LONG DISTANCE,

Complainant,

vs.

PACIFIC BELL,

Defendant.

CC Docket No. 93-161
File No. E-89-85

By: Presiding Judge Walter C. Miller

ORDER

Upon consideration of the Motion to Accept and the Motion for Clarification filed by Pacific Bell on July 14, 1993, the Presiding Judge hereby finds that the Motions should be DENIED.

Accordingly, it is ORDERED that the Motions to Accept and Motion for Clarification filed by Pacific Bell are hereby DENIED.

Date

Presiding Judge

CERTIFICATE OF SERVICE

I, Michael R. Carithers, Jr., hereby certify that on this 23rd day of July, 1993, I caused a true and correct copy of the foregoing Opposition to Petition for Clarification to be sent by regular, first-class mail, postage prepaid, to:

James P. Tuthill, Esquire
Nancy C. Woolf, Esquire
Pacific Bell
140 New Montgomery Street, Room 1530-A
San Francisco, CA 94105

and by hand delivery to:

Thomas D. Wyatt, Esquire
Chief
Formal Complaints and Investigation Branch
Federal Communications Commission
Room 107
1250 23rd Street, N.W.
Washington, D.C. 20554

Administrative Law Judge
Walter C. Miller
Federal Communications Commission
Room 213
2000 L. Street, N.W.
Washington, D.C.

A handwritten signature in black ink, appearing to read 'Michael R. Carithers, Jr.', with a stylized, cursive script.

Michael R. Carithers, Jr.

STAMP & RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Clark-Bader, Inc., d/b/a)
TMC Long Distance,)
)
Complainant,)
)
v.)
)
Pacific Bell Telephone)
Company,)
A Pacific Telesis Company,)
)
Defendant.)
_____)

File No. E-89-85

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MAR 20 1991

Federal Communications Commission
Office of the Secretary

PARTIAL OPPOSITION TO
MOTION FOR ORDER GRANTING IMMUNITY

Clark-Bader, Inc., d/b/a TMC Long Distance ("Complainant" or "TMC"), by its attorneys, herewith opposes in part the Motion for Order Granting Immunity ("Motion") filed by the attorneys of Pacific Bell Telephone Company ("Defendant" or "Pacific Bell") on March 7, 1991 in the captioned proceeding. The Motion seeks an order from the Commission granting immunity to two former employees of TMC, Cathy Miller and Mitchell Lipkin. TMC opposes a grant of the Motion until the liability phase of this proceeding is completed. In support whereof, the following is shown.

1. The Common Carrier Bureau bifurcated this proceeding into two parts. It ordered that the question of liability, whether Defendant violated the Communications Act and unlawfully denied TMC equal access, be separated from the question of damages. This proceeding is currently in the liability phase, but Defendant's Motion will have the effect of complicating and unnecessarily confusing the progress of this first phase of the proceeding. The Defendant's Motion not only raises issues that are irrelevant and

prejudicial in their irrelevance, but whose resolution at this phase may constitute a potential waste of scarce Commission resources in light of the bifurcation ruling already made.

2. Reduced to its essence, Defendant's Motion is based on two equally untenable assertions. Defendant requests immunity for witnesses who will testify to Complainant's alleged falsification of customer complaint records, and attempts to tie this testimony to the liability phase of the proceeding.

Pacific understands that these witnesses will testify that they falsified these records at the ultimate direction of Stephen Bader, the president of TMC.

Obviously, this testimony is crucial to Pacific's defense in this matter. If Pacific's tandem did not cause damage to TMC's business, then no liability can be found. (Emphasis added.)

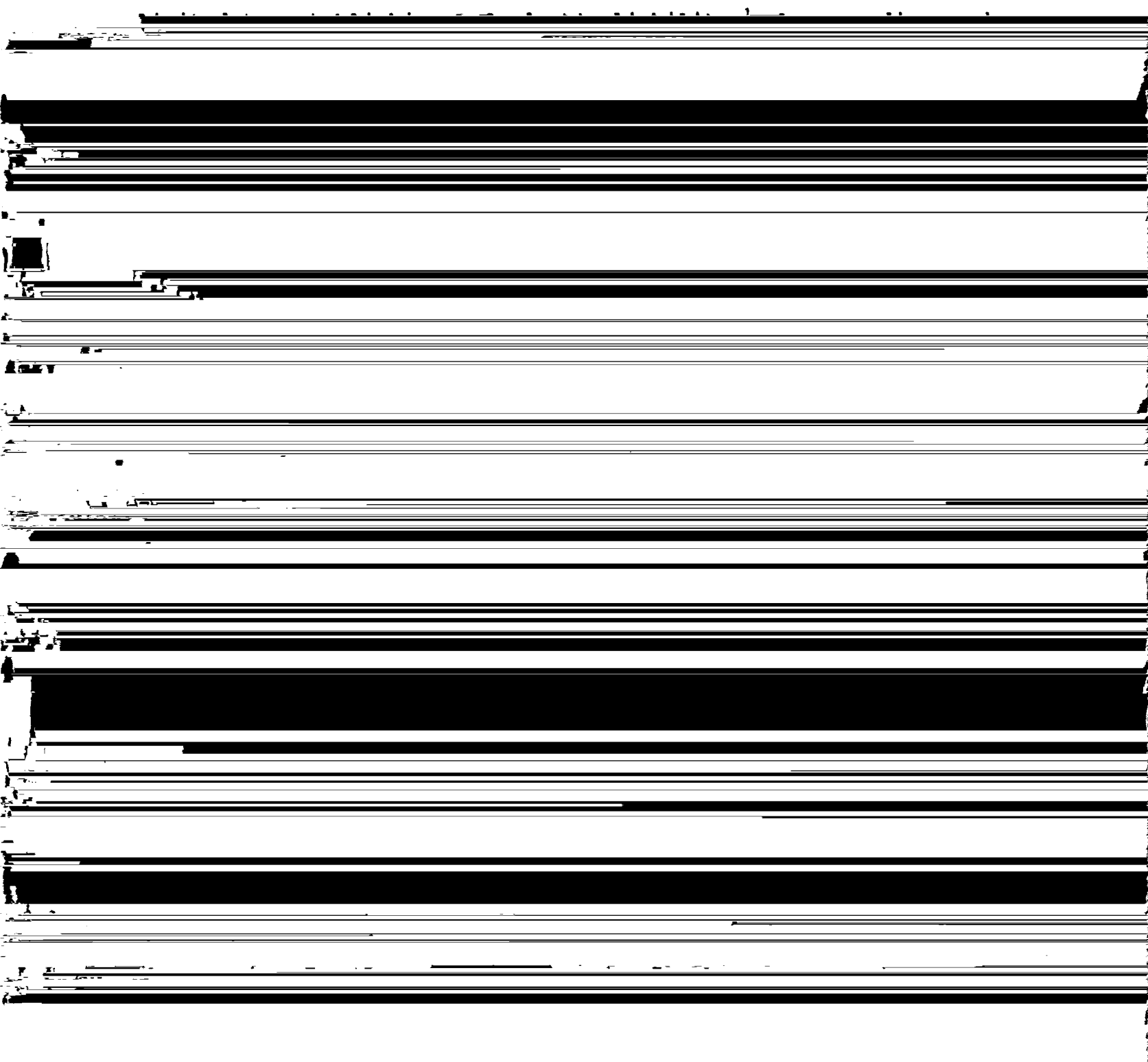
Motion at 2-3.

3. A grant of Defendant's Motion prior to the determination of liability would be procedurally erroneous and prejudicial to TMC because (1) Defendant should not be allowed to end-run the Bureau's ruling bifurcating this proceeding when the evidentiary value of the customer records concerns the level of provable damages sustained by Complainant, an issue not now before the Commission; and (2) Complainant is placed at an unfair disadvantage in the prosecution of its case by having to repeatedly counter Defendant's misplaced and unfounded reliance on its vague "understanding" about the nature of the purported testimony of these witnesses, when the records are not germane to


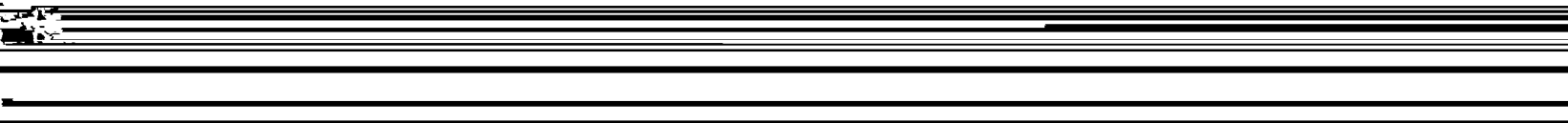


the question of liability and are raised now solely for prejudicial effect.

ARGUMENT

4. TMC has a right to the orderly conduct of its case in accordance with the Bureau's ruling that the first phase be



hypercritical analysis has failed to challenge, it is contrary to rudimentary logic that TMC would falsify records for purposes of showing liability. Moreover, were the testimony of Defendant's witnesses capable of impeaching some of the customer records, many



in the Complaint. While this fact alone does not eliminate the right of Defendant to explore the evidentiary value of the customer records, that is an area of inquiry for the stage of these proceedings dealing with damages, not liability. In other words, even if TMC were found responsible of having changed records, which it will not be, this would not negate the culpability of Defendant for having failed its equal access obligations, of seeking to do harm to TMC, of conspiring with others to impose that harm and of favoring its own self-interests at the expense of TMC.⁴

7. Even were the testimony relevant, it should be excluded as prejudicial at this stage of the proceedings. The Federal Rules of Evidence provide insight on this point. Rule 403 provides for the exclusion of even relevant evidence on grounds of prejudice, confusion or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. Alimenta, Inc. v. Stauffer, 598 F. Supp. 934 (N. D. Ga. 1984) (excluding accountant's report as prejudicial due to undue emphasis placed on accounting practices). Alimenta

⁴ Indeed, if Defendant is shown to be responsible for such failures, motivations and conduct, TMC is justified in its expansive view that the negative business developments it experienced were the direct result of Defendant's broad range of misconduct. Defendant may argue that TMC's evidence does not withstand the rigors of evidentiary analysis, but such an argument in no way supports a claim that TMC would risk, much less engage in, intentional altering of evidence.

counsels against admission of duplicative evidence which creates undue delay, prejudicial emphasis and a focus on irrelevant issues. Id. at 941. Additionally, when a proceeding is bifurcated, discovery into damages is not economical or efficient. Hayden v. Chalfant Press, Inc. 281 F.2d 543 (9th Cir. 1960) (sustaining objection to discovery inquiry into damages). In the instant case, consideration now of testimony irrelevant to damages will result in prejudice, confusion and waste of time.

8. Under Rule 403, relevant evidence which is a waste of time may be ignored. The Bureau has already determined that time will be spent on damages later. Consideration now of testimony directed at the amount of damages is duplicative and contrary to the Bureau's original determination that bifurcation would be the most efficient and expedient means of proceeding.

9. Defendant's constant vague allusions in the liability phase of this proceeding to its "understanding" about falsified records is prejudicial. Defendant is clearly attempting to institute a collateral attack on Complainant's credibility by engaging in irrelevant character assassination. For example, Defendant has not attempted to show that evidence concerning its own malfunctioning tandem is false. Instead, it has attempted to show that evidence concerning the amount of damages resulting from that malfunctioning tandem may be impeachable.

10. The testimony should also be excluded from this stage of the proceeding because it only confuses the issue. TMC has technical evidence that Defendant's tandem failed to perform properly. The admitted amount of unchallenged customer records shows that the effects of that poor performance were noticed by TMC

customers and produced adverse business consequences for TMC. Because Defendant cannot even allege the ability to impeach all records, it continues to face strong evidence of its own liability. The purported "testimony" in question must be viewed for what it is, a side-show designed as a distracting device.

11. Defendant's pursuit of this line of inquiry interrupts and interferes with TMC's presentation of its case on the liability of Defendant, a liability that if established will also bear significantly on the credibility of the witnesses Miller and Lipkin, the evidentiary value of the customer records, and the vindication of the good name of Mr. Bader. In some respects, Defendant's attempts to drag its witnesses in out of time merely demonstrates its own concern with their credibility. Once liability is established, Miller and Lipkin may not be too believable, especially in light of the unimpeached customer complaint records.

12. Nor may Defendant argue that lack of damages shows TMC was not harmed. Defendant must still be held to its obligations under the Communications Act, which requires the Commission to prosecute complaints whether or not there are any damages involved. Even were it assumed, solely for argument's sake, that all customer records can be impeached, this would not justify a refusal to find (based on direct independent evidence in the record) that the conduct of Defendant violated its equal access obligations, that it had willfully engaged in discriminatory and unreasonable practices in violation of the Communications Act, that it willfully conspired in favor of TMC's larger and therefore more favored competitors or that it employed the tandem for its own intraLATA

competitive purposes thereby siphoning off needed capacity to serve TMC's long distance services. Such findings would surely justify forfeitures and other remedial steps by the Commission in the public interest.

13. Finally, Defendant's Motion further highlights a curious aspect of this case, one Complainant can no longer ignore. Defendant's repetitious recitation of some secret knowledge, gained one knows not where, as to the purported nature of these witnesses' testimony is most unusual. Witnesses seeking immunity for their testimony for fear of criminal prosecution do not disclose the nature of that criminal conduct other than to their own attorney.

14. This is not to say that Defendant could not have come by its supposed "understanding" by some legitimate means. Here, however, Defendant's claim of a special "understanding" is being used to redirect the proper focus of this case and as an affirmative strategy to undermine the credibility of Complainant. Complainant raises this now both to draw the Commission's attention to questions raised about where the interests of the witnesses lie, and to preserve the issue of possible waiver of self-incrimination rights when the matter is addressed at the proper time and in the appropriate context.

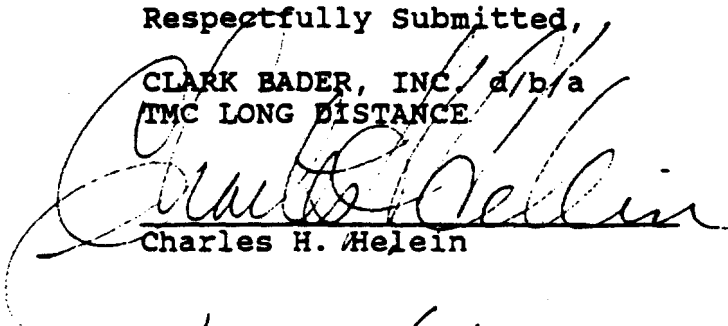
15. TMC submits that the Commission need not at this time allow itself to be drawn into Defendant's subterfuge and be distracted from the full exploration of Defendant's own malfeasance and misfeasance. Commission resources are too valuable and too scarce to engage in "witch hunts." Once TMC proves the liability of Defendant, the issue of the amount of damages sustained by

Complainant will become relevant. At that time also, the issue of immunity for Miller and Lipkin can be addressed and resolved.

WHEREFORE, TMC respectfully requests that Defendant's motion not be granted during the liability phase of this proceeding.

Respectfully Submitted,

CLARK BADER, INC. d/b/a
TMC LONG DISTANCE



Charles H. Helein



Laura Montgomery

ARTER & HADDEN
1919 PENNSYLVANIA AVENUE, N.W.
Suite 400
Washington, D.C. 20006
(202) 775-7964

Its Attorneys

Dated: March 20, 1991

CERTIFICATE OF SERVICE

I, Phyllis Daniels, a secretary for the law firm of Arter & Hadden, do hereby certify that I have, this 20th day of March, 1991, caused to be served copies of the foregoing "Partial Opposition to Motion for Order Granting Immunity" by United States Postal Service, first class, postage prepaid, to the following:

ARTER & HADDEN

STAMP & RETURN

1919 Pennsylvania Avenue, N.W.
Washington, DC. 20006
202/775-7100
Telecopier 202/857-0172
Telex 6502156242-MCI

Writers Direct Dial Number:

(202) 775-7864

February 5, 1991

BY HAND DELIVERY

Gregory A. Weiss, Esq.
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
Room 6216
2025 M Street, N.W.
Washington, D.C. 20544

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Federal Communications Commission
Office of the Secretary

ARTER & HADDEN

Gregory A. Weiss, Esq.
February 1, 1991
Page 2

documents, he now believes that such documents could be characterized as "false."

In addition, Mr. Bader states that to the best of his recollection, he never even discussed any such documents with Kathy Miller or Mitch Lipkin. Any instructions or other information they received regarding such documents would have come from others within Complainant's organization. Mr. Bader therefore has no idea on what basis, conjecture or speculation Miller and Lipkin might testify as to his involvement with these documents.

ARTER & HADDEN

Gregory A. Weiss, Esq.
February 1, 1991
Page 3

"understanding" about the nature of the Miller/Lipkin testimony)
and its consultant has had an opportunity to review the transcripts

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

CLARK-BADER, INC. d/b/a
TMC LONG DISTANCE,

PLAINTIFF,

v.

PACIFIC BELL TELEPHONE
COMPANY,

DEFENDANT.

AFFIDAVIT OF
STEPHEN BADER

File No.

E-89-85

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BY _____

STATE OF CALIFORNIA)

COUNTY OF)

s.s.:

STEPHEN BADER, being duly sworn, deposes and says:

1. I am over eighteen years of age and competent to testify to the matters contained herein.
2. I am president and chief executive officer of TMC Long Distance ("TMC"), plaintiff in this action.
3. In response to the allegations made by counsel for Pacific Bell in her January 3, 1991 letter to the Commission, I hereby state that I did not believe, at the time documents concerning the deficiencies of Pacific Bell's local exchange access service and facilities and the adverse impact caused by these deficiencies on TMC's business were submitted to the Commission that such documents were "false."
4. This unqualified denial applies to all such documents.

to Interrogatories filed in this proceeding, and also applies to documents submitted directly to Pacific Bell.

5. As a result of having been informed by counsel that these documents may not stand up to strict evidentiary standards, they are currently being reviewed by company personnel. Despite the fact that as a result of this review TMC may withdraw some of these documents from the Commission's consideration, I still believe that the documents as originally presented to Pacific Bell and to the Commission provide the most accurate picture of the damages TMC suffered as a result of Pacific Bell's conduct.

6. Further, to the best of my recollection, I never discussed such documents with either Kathy Miller or Mitch Lipkin. Any instructions or other information Ms. Miller or Mr. Lipkin received regarding such documents would have come from other individuals within TMC's organization.

7. To the best of my current belief and recollection, I do not know what basis Ms. Miller or Mr. Lipkin would have for any statements to the contrary of what I have stated above.


Stephen Bader

Sworn to before me this

31st day of January 1991


NOTARY PUBLIC

